Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

EX PARTE FILING OF:

Fox Entertainment Group
Fox Television Stations, Inc.

National Broadcasting Company, Inc.
Telemundo Communications, Inc.

Viacom

The Walt Disney Company
The ABC Television Network

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Analysis of Proposals to Revive Financial Interest and Syndication Rules

When the FCC declined to eliminate the financial interest and syndication ("finsyn") rules after its extensive review in 1991, Commissioner James H. Quello wrote in his dissenting statement, "[i]f the Commission [today] set out to adopt finsyn rules for the first time, I find it inconceivable that anyone would consider doing so."[1] His view was vindicated the following year by the United States Court of Appeals for the Seventh Circuit, which harshly rejected the FCC's decision to retain even a portion of the finsyn rules, noting that the Commission's opinion, "like a Persian cat with its fur shaved, is alarmingly pale and thin."[2] The court observed that "[w]hatever the pros and cons of the original financial interest and syndications rules, in the years since they were promulgated the structure of the television industry has changed profoundly." *Id.* at 1046. Ultimately, after multiple fact-intensive and contentious proceedings, the Commission immediately repealed most of the finsyn rules in 1993 and phased out the few remaining restrictions on syndication in 1995.[3] Affirming this repeal, the Seventh Circuit said it was "doubtful" whether the fears that led to the rules' enactment "ever had much basis."[4]

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[1] *Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd 3094, 3247 (1991) (the "1991 Order") (Commissioner Quello, dissenting), *reconsideration granted in part,* 7 FCC Rcd 345 (1991), *rev'd*, *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043 (7th Cir. 1992).

[2] *Schurz Communications,* 982 F.2d at 1050.

[3] *Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd 3282 (1993) (the "Second Report and Order"), *reconsideration granted in part* 8 FCC Rcd 8270 (1993), *aff'd*, *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309 (7th Cir. 1994); *Review of the Syndication and Financial Interest Rules Sections 73.659-73.663 of the Commission's Rules,* 10 FCC Rcd 12165 (1995) (the "1995 Order").

[4] *Capital Cities/ABC, Inc.*, 29 F.3d at 313.

Although the media marketplace has changed in even more profound ways in the years since 1991, various parties to this proceeding are advocating the inconceivable – the creation of new finsyn rules. Specifically, the Coalition for Program Diversity urges the FCC to impose a 25 percent quota on the prime time schedules of the four largest broadcast networks for programming produced exclusively by producers it defines as "independent."[5] Others have proposed prohibiting established broadcast and cable networks from producing more than 50 percent of their entertainment programming in-house.[6]

While these proposals differ in some of the details, they have uniform failings. First, they ignore the long and tortuous history of the finsyn rules, including the numerous fact-intensive proceedings leading to their ultimate repeal. Second, they fail to take into account the Commission's prior reasoning in eliminating the rules or the vast changes in the media landscape in the ensuing years. Third, they adopt a curiously narrow concept of "diversity" that favors their self-interest while ignoring the perspectives and interests of viewers and the proven benefits of competition free of government intervention. In short, the proponents of a new finsyn regime distort the available evidence and present a false picture of the programming marketplace that misrepresents both the FCC's experience under the old finsyn rules and real world developments since they were repealed.

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[5] Reply Comments of the Coalition for Program Diversity, Docket Nos. 02-277, 01-235, 01-317 and 00-244 (Feb. 3, 2003); Ex Parte Notice filed on behalf of the Coalition for Program Diversity, Docket No. 02-277 (April 4, 2003).

[6] Response Comments of the Caucus for Producers, Writers and Directors, Docket No. 02-277. In addition to the cap on in-house productions, the Caucus proposes a prohibition on the acquisition of syndication rights in programs produced by outside producers, and would limit license terms during the network run at four years for series and two years for movies. *See also* Joint Comments of Writers' Guild of America, west, *et. al*., Docket No. 02-277 (Jan. 2, 2003) (proposing a requirement that broadcast and cable "national program services" purchase at least 50 percent of the entertainment their prime time schedules from "independent producers").

As a threshold matter, the proposals to reinstitute variants of the financial interest and syndication rules are incompatible with both the scope and purpose of this proceeding. In the Notice of Proposed Rulemaking (the "NPRM"), the Commission specified that, with respect to television, this proceeding would focus on the national television multiple ownership rule, the local television multiple ownership rule, the radio-television cross-ownership rule, and the dual network rule,[7] and it did not contemplate expanding its reach to issues that have nothing to do with the ownership of broadcast outlets.[8] Furthermore, the procedural context of the instant proceeding –– the biennial ownership review under Section 202(h) of the Telecommunications Act of 1996 –– makes this docket particularly ill-suited for the Commission to consider adopting new finsyn rules. Section 202(h) requires the Commission to repeal or modify regulations it finds are no longer in the public interest.[9] This section establishes a presumption in favor of repeal of existing ownership restrictions.[10]

[7] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets,* 17 FCC Rcd 18503, 18505-06 (2002). The FCC is also reviewing the its local radio ownership rules and the newspaper-broadcast cross-ownership rule.

[8] Any effort to include financial interest and syndication in this docket is vulnerable on judicial review because the NPRM did not fairly apprise interested persons that such rules could be reimposed as a result of this proceeding, nor are finsyn rules a "logical outgrowth" of the specific rules under consideration in the NPRM. *National Black Media Coalition v. FCC,* 791 F.2d 1016, 1022 (2d Cir. 1986) (invalidating rule where "the notice given by the Commission was wholly inadequate to enable interested parties to have the opportunity to provide meaningful and timely comment on the proposal which culminated in the final decision of the agency.").

[9] Sec. 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[10] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules"), *reh'g granted in part*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002). *See* Comments of Fox Entertainment Group, Inc. and Fox Television Stations,

A presumption against adopting new rules is particularly strong, and especially so in the case of financial interest and syndication rules. For two decades, FCC analyses have concluded that such rules were unnecessary, and, as noted above, the Commission's decision to retain even a modified form of the rules in 1991 was thoroughly repudiated by the United States Court of Appeals for the Seventh Circuit. Following that decision, the FCC repealed most of the finsyn rules immediately and eliminated remaining restrictions over a two-year review period. As in the current biennial review proceeding, the burden of proof for that review was on those who advocated retaining the few remaining rules. At the end of the review period in 1995, the Commission eliminated the remaining rules two months ahead of schedule because it found that "the networks now face more competition than in 1993 for the acquisition of television programming from broadcast and non-broadcast television distributors," because the record in earlier proceedings "described at length the negative effects of the fin/syn rules on production and distribution markets," and because the proponents had failed to meet their burden of proving that the rules were necessary.[11]

In light of that background and considering the significant expansion of media choices in the years since finsyn rules were interred, the current proposals to restrict programming production are patently absurd. They are based on a profound lack of historical perspective, failing even to address the Commission's reasoning in its various decisions to eliminate the previous rules. Worse still, those who advocate adoption of specific quotas regulating prime time programming on the top-four television broadcast networks distort the evidence regarding the current state of the television marketplace and the amount of

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Inc., National Broadcasting Company, Inc. and Telemundo Communications Group, Inc., and Viacom (collectively the "Joint Commenters") at 3-5.

[11] 1995 Order, 10 FCC Rcd at 12,171-72.

"independent" versus "network" production. In so doing, they also ignore that their demand for government intervention in network programming decisions cannot help but limit competition – a result obviously contrary to the best interests of consumers. Finally, the pro-finsyn advocates present a legal analysis that provides only the most cursory review of court decisions and which fails to analyze the substance of the cases that forced the ultimate repeal of the previous rules. The finsyn advocates also take quotes out of context from decisions highly critical of finsyn rules in an apparent effort to make it appear as though the courts would support their position. In fact, the finsyn rules were repudiated by the Seventh Circuit Court of Appeals on more than one occasion, ultimately accompanied by the admonition that the Commission "had better have an excellent, a compelling reason" if it decides to regulate the television market. They also misstate the relevant constitutional framework and present a view of FCC authority over programming that is out of step with more recent case law.

This submission addresses each of these shortcomings on the part of the pro-finsyn commenters in three attached memoranda. The first memo tracks the history of the finsyn rules along with the judicial and administrative decisions to repeal them, thus supplying the historical perspective that is conspicuously absent in the comments proposing new finsyn rules. The second addresses claims made by commenters in favor of programming quotas, and explains how the proposals fail to make the case for adopting new restrictions in the form of production limits. The third memo analyzes the legal environment in which any financial interest and syndication rules would be evaluated, thus supplementing the paper-thin analysis provided by rule proponents.

<u>Memorandum</u>

I. Financial Interest and Syndication Rules in Historical Perspective

Current proposals urging the FCC to adopt a new form of financial interest and syndication ("finsyn") rules ignore the rich historical record in which both the courts and the FCC rejected such restrictions as being unnecessary and antithetical to programming diversity. Almost from the rules' inception in 1970, the Commission, expert competition agencies, and independent commenters repeatedly questioned the justification for finsyn restrictions. The Commission held multiple proceedings between 1980 and 1995, each of which compiled extensive factual records with input from all sectors of the programming, production and distribution industries. Following a thorough examination of the marketplace and the changing competitive position of the broadcast networks, the FCC ultimately concluded that there was no public interest need for the rules. Based on this experience of over three decades, along with further developments in the television industry that have been noted by the Commission since it last addressed the finsyn issue, it is inconceivable that the agency could now reverse course. This Memorandum provides a sense of historical perspective that is absent from the proposals to adopt new financial and syndication rules.

Initial Adoption of the Finsyn Rules

The FCC adopted the financial interest and syndication rules in 1970 based on information gathered from a program inquiry that it initiated in 1959 and a Notice of Proposed Rulemaking issued in 1965.[12] Using evidence drawn from the infancy of the television industry, the FCC found that "[o]nly three organizations [*i.e.* ABC, NBC, and CBS] control access to the crucial prime time evening television schedule."[13] In light of these findings, the Commission hoped that regulation would help bolster programming sources other than the networks by limiting the networks' ability to supply programming to independent (*i.e.* non-affiliated) stations and would protect producers by prohibiting network acquisition of syndication rights to prime time programming.[14]

The Commission adopted several rules as a result of its inquiry. First, it prohibited network affiliates in the top 50 markets from broadcasting more than three hours of network programs during prime-time hours, the so-called Prime Time Access Rule ("PTAR"). The Commission also adopted the financial interest and syndication rules, which subject to certain exceptions, prohibited a television network (defined at the time to include only ABC, NBC, and CBS), from syndicating television programming in the United States, or from syndicating outside the United States programming for which it was not the sole producer, or from having any option or right to share in the revenues from domestic or foreign syndication.

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[12] *Order for Investigatory Proceeding, Docket 12782,* 24 Fed. Reg. 1605 (1959); *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting,* 45 FCC 2146 (1965).

[13] *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting*, 23 F.C.C. 2d 382, 394 (1970), *aff'd sub nom. Mt. Mansfield Television, Inc. v. FCC,* 442 F.2d 470 (2d. Cir. 1971).

[14] *Mt. Mansfield Television, Inc.,* 442 F.2d at 475-76.

These rules also prohibited a network from acquiring any financial or proprietary right or interest in the exhibition, distribution, or other commercial use of television programming produced by someone other than the network for distribution on non-network stations. 47 C.F.R. § 73.658(j), (k) (1970).

Review of the Rules

Within ten years of adopting the finsyn rules, the Commission initiated the first in a series of proceedings to determine whether experience with the regulations supported their retention. In 1979 the FCC commissioned an extensive independent staff study of the finsyn rules that concluded in 1980 that the rules were unjustified and should be eliminated.[15] Three years later, the Commission issued the first of its decisions cautiously but clearly proposing elimination of the financial interest and syndication rules. As subsequently summarized by the United States Court of Appeals for the Seventh Circuit, the Commission found in its 1983 "Tentative Decision and Request for Further Comments" that the networks "had lost any significant monopoly or market power that they may once have had [and now] [t]he financial interest and syndication rules were hampering the entry of new firms into production."[16] Thus, as early as two decades ago, the Commission found that the financial interest and syndication rules were "in need of very substantial revision," and, even if some regulatory controls were considered to be appropriate, "it does not appear that the financial interest rule is either necessary or desirable."[17]

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[15] Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation,* (1980).

[16] *Schurz Communications,* 982 F.2d at 1047.

[17] *Evaluation of the Syndication and Financial Interest Rules*, 94 F.C.C.2d 1019, 1022 (1983) (the "1983 Tentative Decision").

In the 1983 Tentative Decision, the Commission found it was unnecessary to control the ability of networks to bargain for and acquire passive financial interests in programming and therefore proposed to repeal the financial interest rule. It also tentatively decided to narrow the scope of the syndication prohibition to include participation in only domestic syndication markets and to cover only prime time programming.[18] Finally, the Commission announced it would sunset the remaining syndication restrictions in 1990, unless before that time the Commission affirmatively determined that this narrower set of rules should be retained. 1983 Tentative Decision, 94 F.C.C. 2d at 1022-23. Despite those clear findings and the direction in the 1983 Tentative Decision, mainly as a result of Congressional pressure, the Commission took no steps to follow up on these proposals. *See Schurz Communications*, 982 F.2d at 1047.

The Fox Petition

The financial interest and syndication rules remained in place with no further Commission action until 1990, when Fox Broadcasting Company petitioned the Commission to modify the rules as proposed in the 1983 Tentative Decision and to waive the rules for Fox in the interim.[19] At that time, Fox was considered to be an "emerging network" and Fox claimed that obtaining relief from the financial interest and syndication rules was critical for its development into a viable "fourth network," the evolution of which had long been a cherished Commission

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[18] The FCC also said that programming in which a network retained any continuing off-network financial interest would have to be made available for syndication within six months after the end of its network run and for series running more than five years, by the end of the fifth year of its network run. Such restrictions are commonly referred to as "anti-warehousing" restrictions.

[19] *Fox Broadcasting Company*, 5 FCC Rcd 3211 (1990).

goal.[20] The FCC granted Fox's waiver request and opened a new rulemaking proceeding in which it sought comment on several specific options concerning eliminating, modifying, or retaining the financial interest and syndication rules.[21]

In response to the 1990 NPRM, the Commission received another round of comments from all segments of the television industry, and even held a one-day public hearing to ensure that all views were being fully aired. The commenters included the U.S. Department of Justice ("DOJ") and the Federal Trade Commission's Bureau of Economics staff ("FTC Staff"), both of which pointed to the lack of economic justification for the financial interest and syndication rules. DOJ concluded that the networks lacked sufficient market power to adversely affect program output through vertical integration. Moreover, even assuming that the networks possessed some degree of power in the program acquisition market, DOJ found no basis in economic theory to presume that network ownership of financial interests and exercise of syndication rights would have an adverse effect on program production.[22] The FTC Staff's comments took a similar tack, concluding that a compelling economic case did not exist for continuing to impose a *per se* ban on network acquisition of broadcast rights to newly-produced television programs.[23]

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20 *See, e.g., Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting,* 25 FCC 2d 318, 333 (1970).

21 *Amendment of 47 C.F.R. §73.568(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, 5 FCC Rcd 1814 (1990) (the "1990 NPRM").

22 *See* Comments of the United States Department of Justice, MM Docket No. 90-162, June 14, 1990.

23 *See* Comments of the Staff of the Bureau of Economics of the Federal Trade Commission, MM Docket No. 90-162, September 4, 1990.

In the face of this evidence, the Commission found that "the networks may already have lost so much of their market power as no longer to pose a threat to competition."[24] However, in a 3-2 vote, a deeply divided Commission only modified the rules rather than eliminating them entirely.[25] In addition, it added new restrictions on network in-house production (*i.e.* the number of hours of entertainment programming a network could produce for itself), similar to the rules proposed by participants in the current broadcast ownership proceeding.[26] The Commission majority acknowledged the dramatic changes in the video marketplace since 1970, such as the decline in the networks' audience share, the emergence of a flourishing cable industry, and the achievement of the rules' goals of a robust syndication industry while protecting the rights of non-network producers.[27] Nevertheless, the Commission decided to adopt a complex series of amendments to the rules rather than to repeal them.[28]

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[24] *Schurz Communications*, 982 F.2d at 1047.

[25] *See* 1991 Order, *supra*.

[26] The finsyn rules never included a limit on network in-house production. There were such production quotas in the consent decrees between ABC, NBC, CBS and the Department of Justice, but those quotas expired in 1990. *See* Footnote 22, *infra.*

[27] 1991 Order, 6 FCC Rcd at 3099.

[28] The changes included: (1) no longer applying the rules to non-entertainment programming in prime time or to any network programming outside of prime time, (leaving them in place with respect prime time entertainment programs and network participation in first-run syndication); (2) allowing a network to acquire financial interests, domestic syndication rights, and foreign syndication rights in any outside production aired on its prime time entertainment schedule if those rights were purchased through separate negotiations started at least 30 days after signing the network license fee agreement and access to the network's schedule was not conditioned on the acquisition of such rights; (3) allowing a network to produce only up to 40 percent of its prime time entertainment schedule in-house and also retain financial interests and active syndication rights in those productions; and (4) requiring a network to maintain semi-annual reports in its owned stations' public files certifying compliance with these rules.

The Commission's 1991 decision was strongly opposed by FCC Chairman Sikes and its senior member, Commissioner Quello, both of whom wrote lengthy dissents.[29] Similarly, the DOJ and FTC opposed the FCC's majority decision, especially the new limit on network in-house production. As the DOJ had explained during the proceeding:

> The now-expired limitations on internal program production contained in the department's consent decrees with the three broadcast networks were intended to be temporary limitations on the activities of the networks, and there has been no showing in this proceeding that these limitations should be extended by Commission regulations. Regulations imposing limitations on how much any firm can produce internally are extreme and, unless fully justified by competitive considerations, are inherently anticompetitive. They should not be imposed without strong theoretical and evidentiary support for the conclusion that anticompetitive effects are quite likely in their absence. As our previous comments have shown that support is wholly lacking. The changes in the television marketplace since the [financial interest and syndication rules] were imposed, notably the explosive growth of cable television and the emergence of a fourth broadcast network, point strongly in the direction of removing existing regulations, not imposing new ones.[30]

The FTC Staff reiterated that continuing restrictions, including limits on network production, would be "unnecessary, ineffective, and counterproductive."[31]

Judicial Scrutiny of the Decision to Retain the Rules

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[29] 1991 Order, 6 FCC Rcd at 3168-3212 (Chairman Sikes, dissenting); *id*. at 3213-49 (Commissioner Quello, dissenting).

[30] *Further Comments of the United States Department of Justice*, MM Docket 90-162 (December 21, 1990), p. 12. See also *Further Comments of the United States Department of Justice in Response to the Commission's March 15, 1991 Order*, MM Docket 90-162 (March 25, 1991), p. 8 ("the Department continues to believe that there is no basis in competition policy for any restriction on network ownership of financial interests and syndication rights"). *See* Footnote 22*, infra*, discussing the antitrust consent decrees.

[31] Additional *Comments of the Staff of the Bureau of Economics of the Federal Trade Commission*, MM Docket 90-162 (March 25, 1991), p. 8. *See also id*. at 11 n.30 (opposing per se restrictions on in-house production by both broadcast and cable networks).

In *Schurz Communications, Inc. v. FCC*, the United States Court of Appeals for the Seventh Circuit vacated the *1991 Order*, finding that the Commission had totally failed to offer any rational justification for the retention of finsyn restrictions. The Court's pointed opinion vividly illustrated the extent to which the FCC failed to satisfy the most basic principles of administrative decision-making:

> It is not enough that a rule might be rational; the statement accompanying its promulgation must show that it is rational – must demonstrate that a reasonable person upon consideration of all the points urged pro and con the rule would conclude that it was a reasonable response to a problem that the agency was charged with solving.
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> The new rules flunk this test.....Key concepts are left unexplained, key evidence is overlooked, arguments that formerly persuaded the Commission and that time has only strengthened are ignored, contradictions within and among Commission decisions are passed over in silence. The impression created is of unprincipled compromises of Rube Goldberg complexity among contending interest groups viewed merely as clamoring suppliants who have somehow to be conciliated.
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> The Commission's treatment of precedent was also cavalier….In 1983, in its tentative decision, the Commission rejected the proposition that the networks had significant market power, preventing efficient risk-sharing, and concluded that the rules should be phased out by 1990. In the eight years between that decision and the one under review the networks lost still more ground, with the continued rapid growth of cable television and the advent of the Fox network. The Commission majority cited the tentative decision but did not discuss it – did not explain what had happened in eight years to justify the Commission's about face or, if nothing had happened, why the tentative decision had been wrong from the start. The tentative decision had also laid down a general approach to the evaluation of network restrictions: "the Commission should not intervene in the market except where there is evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public." That standard went unremarked in the present order.[32]

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[32] *Schurz Communications*, 982 F.2d at 1049-50, 1053 (internal citations omitted). The *Schurz* court's approach is consistent with a decision the following year, eliminating antitrust

The *Schurz* court stayed its order vacating the revised finsyn rules for six months to allow the Commission to revisit the issue. During that period, the Commission again compiled a sizable factual record and issued a *Second Report and Order* that eliminated almost all of the financial interest and syndication rules.[33] The Commission based the decision to eliminate the rules on: (1) "the decline in network audience share [which] has continued unabated," citing statistics showing substantial reduction in the networks' prime time audience share (from 93% in 1975 to 59% in 1992); (2) the networks' diminished share of TV advertising revenues; and (3) the networks' reduced share of entertainment programming expenditures. "In short," the Commission explained, "the networks' position in the programming acquisition market is no longer as dominant and continues to erode." The reasons for this decline were characterized as:

> the emergence of other viewing options, including a new network, independent television stations, and cable television networks. Each of these alternatives represents not only a source of diversity for viewers, but an additional market opportunity for program producers. In particular, we now agree that the overall demand for programming in the broadcast and cable marketplace limits a network's ability to control the market or dictate prices for prime time entertainment programs. Moreover, the demand by non-

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consent decrees against the three networks which included restrictions similar to the financial interest and syndication rules. *United States v. National Broadcasting Co.*, 842 F. Supp. 401 (C.D. Cal. 1993).

[33] The Commission retained only the prohibition against active domestic syndication, the anti-warehousing restrictions and the reporting requirements. These remaining restrictions were to be eliminated two years after the antitrust consent decrees against the three networks, which included restrictions that essentially mirrored the Commission's 1970 financial interest and syndication rules, had been lifted. *See* Second Report and Order, *supra*. *See U.S. v. National Broadcasting Co*., 449 F. Supp. 1127 (C.D. Calif. 1978), *aff'd,* 603 F.2d 227 (9th Cir.), *cert. denied*, 444 U.S. 991 (1979); *U.S. v. CBS, Inc.,* 45 Fed. Reg. 34464 (1980); *U.S. v. American Broadcasting Companies*, 45 Fed. Reg. 58411 (1980). On November 10, 1993, the U.S. District Court for the Central District of California entered an order vacating the decrees. *United States v. National Broadcasting Co., supra.*

> network outlets for programming comparable to that licensed by the networks for prime time exhibition is continuing to expand.

Second Report and Order, 8 FCC Rcd at 3304.

In denying a court challenge to the Second Report and Order, the Court of Appeals commended the Commission for responding to the *Schurz* decision in a straightforward manner, without attempting "to offer a more convincing rationalization for the 1991 rules, or tinker with them around the edges. . . . Instead, it threw out the rules, convinced that the objections to them were unanswerable."[34] The Court also expressed doubt as to whether the concerns which led the Commission to adopt the financial interest and syndication rules "ever had much basis" and how by 1991, when the Commission tried to revise the rules:

> its fears about the consequences of unleashing the networks to compete with independent producers, syndicators, and stations had become almost entirely chimerical. The three networks, battered by the growth of cable television and the videocassette, and by the creation of a fourth broadcast network (Fox)--developments that confronted the three original networks with greatly intensified competition for television viewers--no longer had a monopoly of popular programs. Producers, moreover, had begun creating popular first-run programming for independent stations, decreasing those stations' dependence on network reruns.[35]

But most significant for the Commission's consideration of the arguments of today's finsyn proponents, the Court articulated the standard the Commission must meet in order to continue or reinstate any form of finsyn regulation:

> We suspect that the networks' real concern is … with the possibility that … the Commission (three of whose five members are new since the decision under review) may change its mind about deregulating the television program market. *But if it does so, it had better have an excellent, a compelling reason*. The three original networks are even weaker today than they were in March

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[34] *Capital Cities/ABC, Inc.*, 29 F.3d at 313.

[35] *Id.* at 312.

> of last year when the decision to deregulate was made, and no doubt they will be weaker still next year when the new proceeding is to commence.[36]

Endgame for Finsyn

Six months prior to the November 10, 1995 sunset of the last vestiges of the finsyn rules, the Commission held a final review "to afford an opportunity for opponents of fin/syn repeal to demonstrate that retention of restrictions is warranted."[37] After again receiving public comment, the Commission concluded that those parties favoring retention of the remaining financial interest and syndication rules had "failed to meet their burden of proof and . . . continuation of the rules therefore is not justified."[38] With no remaining justification for the rules, the Commission even accelerated their sunset date and the remaining financial interest and syndication rules were deleted on September 21, 1995.[39]

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Throughout the history of the financial interest and syndication rules, the Commission and the courts have expressed concern about the underlying need for such restrictions. Through multiple proceedings, each of which compiled a voluminous factual record with input from all sectors of the video market, the Commission concluded that the rules could not be justified. Nonetheless, both the Commission and the courts proceeded very cautiously before taking any step to eliminate the rules, ensuring that the television programming

[36] *Id.* at 316 (emphasis added).

[37] *Review of the Syndication And Financial Interest Rules, Sections 73.659 - 73.663 of the Commission's Rules,* "Notice of Proposed Rulemaking," 10 FCC Rcd 5672, 5763 (1995).

[38] 1995 Order, 10 FCC Rcd at 12165.

[39] The Commission also rejected arguments about the networks' allegedly dominant role in the video production and distribution market when it eliminated PTAR. *Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules,* 11 FCC Rcd 546 (1995).

marketplace and the public interest would not be adversely affected and the negative results predicted by the rules' proponents would not materialize.

Time and again, the Commission conducted factual inquires and found there was no need for the rules to continue. Slowly, carefully, prudently, and following multiple rounds of public comment, the rules were eliminated. The Commission must conclude that there is "an excellent, a compelling reason" to reverse the findings and conclusions it has repeatedly reached on the necessity for and adverse consequences of finsyn-type regulations. Based on the history of over three decades, and the further competitive developments in the video industry since the Commission last spoke on this issue, it is inconceivable that the Commission could now disregard its experience and previous reasoning and adopt a new version of the financial interest and syndication rules.

Memorandum

II. Proposals to Resurrect Financial Interest and Syndication Rules – Like the Justifications for the Former FinSyn Rules – are "Alarmingly Pale and Thin"

Proposals asking the FCC to adopt a new form of finsyn rules should be understood for what they are — a naked attempt to enlist the government to secure a guaranteed market for certain favored program producers. If finsyn were ever justified, a proposition placed in substantial doubt by reviewing courts a decade ago and by the FCC, it is clear that such rules have no legitimate place in the modern media marketplace. Television viewers now have more entertainment programming choices than ever before on over-the-air media, cable and home video. Finsyn proponents falsely assert that the choices are limited by focusing on the few networks to which they would prefer to sell their programs, not on the choices available to the public.[40] Worse still, the neo-finsyn advocates provide grossly distorted data on the extent of independent production in the broadcast television marketplace, and provide no logical explanation for how the proposed protectionist measures would contribute to programming diversity.

New Financial Interest and Syndication Rules Cannot be Justified in the Current Media Marketplace

[40] When it repealed the finsyn rules in 1995, the Commission found that the rules had focused too narrowly on the established broadcast networks as purchasers of broadcast programming to the exclusion of other distribution channels. 1995 Order, 10 FCC Rcd at 12171. The economic data submitted by the Joint Commenters in the current proceeding further confirm that the "programming shown on broadcast television is substitutable with programming distributed by cable, DBS and other satellite services, and through prerecorded videocassettes and DVDs." *See* Economic Study E to Joint Comments, Bruce M. Owen and Michael G. Baumann, *Concentration Among National Purchasers of Video Entertainment Programming*, at 2 ("Owen Study").

The most striking thing about the current proposals to restore finsyn rules is that they are not about media ownership or concentration at all – the subjects of the current biennial review proceeding. The thrust of these proposals has nothing to do with existing consumer choices or the amounts or varieties of programs that exist, but instead seek simply to equate the public interest with the proponents' own economic well-being. The problem these commenters address is that the four largest networks are not buying enough of their products and their solution is to advocate rules that would force broadcast (and in some cases, cable) networks to purchase specified amounts of their programming. Accordingly, the commenters propose programming quotas that would limit competition, not enhance it.

As a threshold matter, there is no comparison between the media marketplace of 2003 and the situation that existed when the finsyn rules were adopted. In 1970, the three major broadcasting networks controlled more than 90 percent of the television audience at a time when broadcasting was the only real source of television programming, and the average television viewer received only 6.8 video signals.[41] At that time, there were no significant alternatives to network programming of the Big Three networks; only fourteen of the top 50 media markets had one or more independent VHF stations.[42] There was no prospect for the creation of a fourth broadcast network in 1970 and public broadcasting was in its infancy. Accordingly, the United States Court of Appeals for the Second Circuit noted that "only three organizations control access to the crucial prime time evening television schedule" and that the networks "in large measure determine what the American people may see and hear."[43] However, as demonstrated

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[41] *See* The Media Institute, PRIME TIME FOR REPEAL 51 (1990).

[42] *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d at 483.

[43] *Id*. at 475, 474.

in detail in the Comments filed by CBS, NBC and FOX in the FCC's omnibus ownership proceeding, everything has changed.[44] There has been an explosion of new broadcast and cable outlets and the advent of four additional English broadcast networks and over 300 cable television networks.[45] As a result, by 2002 the average viewer had access to 102 programming channels.[46]

Due to this increased competition, the audience shares of the broadcast networks – whose "dominance" (when there were only three) prompted the adoption of the finsyn rules – have fallen dramatically. For the first time in 2002, advertiser-supported basic cable networks garnered a larger audience share over the *seven* broadcast networks – 48 percent of prime time compared to 45 percent.[47] A prime reason for the competitive growth of cable networks is their

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[44] *See* Comments of Fox Entertainment Group; Fox Television Stations, Inc.; National Broadcasting Company, Inc.; Telemundo Communications, Inc.; and Viacom, filed January 2, 2003, MB Docket 02-277.

[45] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 17 FCC Rcd 26901, 26959 (2002) ("Ninth Video Competition Report").

[46] *See* Statement of David F. Poltrack, Executive Vice President for Research and Planning, CBS Television, FCC Forum on Media Ownership Rules, January 16, 2003 (citing Nielsen data) ("Poltrack Statement").

[47] Allison Romano, *Cable's Big Piece of the Pie*, BROADCASTING & CABLE, Dec. 30, 2002 (citing Nielsen Media Research). In 2001, the seven broadcast networks won 49 percent of the prime time audience, while basic cable had 45 percent.

acquisition of original programming.[48] Indeed, a number of basic cable networks are beginning to outscore established broadcasting networks in brand identity surveys.[49]

In the eight years since the Commission repealed the finsyn rules, two trends have held firm – viewers have gained even greater choices in both outlets and sources of information, and the network audience share has declined. The FCC's annual Video Competition Reports have tracked this phenomenon in the period since finsyn was repealed. In the First Annual Report, issued in 1994, the four broadcast networks (ABC, CBS, NBC and Fox) had 72 percent of the prime time audience during the 1993-94 season,[50] while in the FCC's Ninth Video Competition Report, issued last December, all broadcast stations including the top *seven* broadcast networks had a combined prime time audience share of 58.9 percent (2001-02 season).[51] The prime time audience share for the top four broadcast networks was 45 percent in

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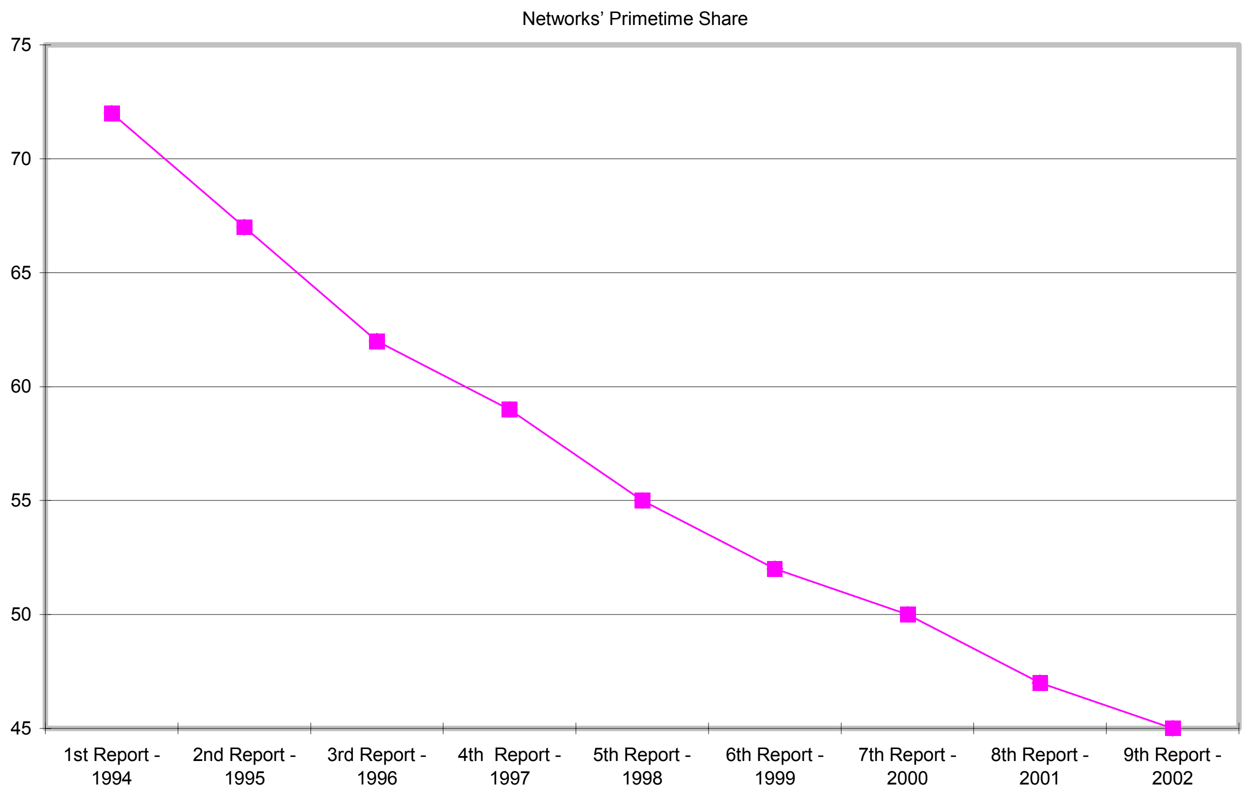
[48] *Id*. ("Original production is hardly a new venture for cable networks. Last year, though, cable shows caught fire like never before. There was a best actor Emmy for *The Shield*. The *Osbournes* graced scores of magazine covers. *Monk*, a cable original, replayed on ABC after its premiere on USA Network. Sci Fi's *Taken* miniseries played over 10 straight weeknights and repeated in fringe and late night; broadcasters could never devote that much time to one series.").

[49] *See*, e.g., *Cable Outscores B'casters in Beta Study*, MULTICHANNEL NEWS, April 9, 2003.

[50] *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 9 FCC Rcd 7442 (1994). It actually is a misnomer to refer to the four "major" networks, since the Commission described Fox at the time as an "emerging network." It also described the potential formation of networks by Paramount and Warner Brothers.

[51] *See* Ninth Video Competition Report, 17 FCC Rcd at 26941.

2002. The chart below[52] illustrates the ongoing erosion of the top four networks' audience share during this period:



The general trend among all broadcast networks obscures the fact that the declining network share is spread among a larger number of networks. In 1996 the WB and UPN networks were launched (thanks to the elimination of the finsyn rules), and they quickly garnered about 9 percent of the prime time audience.[53] Thus, while prime time audience share for all networks declined by 18 percent between 1994 and 2002, the share for the top four networks dropped by nearly 40 percent during the same period. In short, there is no comparison

[52] Chart is based on data from FCC Video Competition Reports and Nielsen Media Research. *See* note 7, *supra.*

[53] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358 (1997).

between the media environment of 1970, when the top three networks garnered 93 percent of the prime time television audience, to 2003, when the top four networks attracted only 45 percent of the prime time audience.[54]

The argument made by proponents of the new finsyn rules is that the growth in choice and diversity is not as vast as it would seem. The Writers' Guild, for example, describes the growth in diversity via cable television networks as a "mirage" because only 91 networks out of 230 can be considered "major," and most of those (80 percent) are owned by six large corporations.[55] But merely to state these figures is to refute the Guild's argument. Whether or not the remaining 139 national programming services are considered "major," they represent choices that no viewer had in 1970, or even in 1990 (when there were 107 national cable networks). Of the "major" cable networks, the six companies that have a financial interest in most networks nevertheless represent twice as many corporations that owned broadcast networks when the finsyn rules were adopted. And, by the Writers' Guild's own count, 18 "major" national programming services are not owned by these six corporations. By any calculation,

[54] *See Schurz Communications*, 982 F.2d at 1046 ("Whatever the pros and cons of the original financial interest and syndication rules, in the years since they were promulgated the structure of the television industry has changed profoundly. The three networks have lost ground, primarily as a result of the expansion of cable television, which now reaches 60 percent of American homes, and videocassette recorders, now found in 70 percent of American homes.").

[55] Joint Comments of Writers Guild of America, west, *et al.,* at 10. Contrary to the Guild's count, the FCC's most recent video competition report notes that there are 308 national networks, an increase of 21 networks over 2001. Ninth Video Competition Report, 17 FCC Rcd at 26959. In addition, the Commission noted that another 60 programming services are planned but not yet operational. *Id*. at 26960

these programming choices multiply by many times the options that were available to television viewers when the FCC previously considered finsyn rules.[56]

The Coalition for Program Diversity takes a different tack, arguing that 43 million Americans do not subscribe to cable or satellite services, and are therefore "totally dependent on the prime time programming aired by over-the-air stations, principally the four major networks."[57] Apart from the fact that this statement overlooks the expanded viewer choices made available by VCRs and other consumer electronic devices (including DVD players, personal video recorders and computers), none of which existed in 1970,[58] it also seeks to obscure what has happened with broadcast network programming since finsyn was eliminated: Fox has grown from being an "emerging" network to an established-network – so much so that finsyn proponents now include it with the broadcast entities they seek to curb. Yet the emergence of Fox was one of the key reasons the FCC eliminated finsyn restrictions – both to remove rules that impeded Fox's growth to "major" network status and to promote competition with the three established networks. As the FCC explained in its *Memorandum Opinion and Order*, "Fox's emergence has provided program producers with a highly significant alternative outlet to ABC, CBS and NBC, and thus operates as a check on the power of these three

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[56] *See* Poltrack Statement at 2 (The four corporations that own major broadcast networks have ownership interests in 25 percent of the video channels available to the public. Put another way, 75 percent of the channels are entirely independent of these companies.). Commission data shows that the Guild's assumptions are wrong. Not only does the Guild under-count the number of national networks, but FCC statistics show that the level of vertical integration continues to decline. *See id*. at ¶ 134 (the percentage of vertically-integrated networks was 30 percent in 2002, compared with 34 percent in 2001). *Id*. & n.444.

[57] Coalition Comments at 3.

[58] Ninety percent of U.S. households owns at least one VCR, and a growing number own DVD players and personal video recorders. Ninth Video Competition Report, 17 FCC Rcd at 26944-46. These alternatives were part of the reason the FCC eliminated the finsyn rules. *See Schurz Communications*, 982 F.2d at 1046.

traditional networks."[59] Ironically, the latter-day finsyn proponents now want to punish Fox for achieving the very success the Commission hoped for.

But the changes in the broadcast industry since the demise of finsyn go far beyond Fox. Indeed, the elimination of finsyn has led to more programming networks, even on broadcast television. The FCC phased out its remaining finsyn restrictions between 1993 and 1995, in part "to give the independent producers an opportunity to form their own networks if they want to have distribution systems that are wholly independent of the existing networks." *Capital Cities/ABC, Inc.*, 29 F.3d at 314. This goal was realized when the WB and UPN networks were launched by the Warner Bros. and Paramount Studios, respectively, in the 1995-96 television season. These launches set the momentum for the creation of other broadcast networks, such as PaxNet in the 1998 season.[60] In addition, Univision is now the nation's fifth largest broadcast television network and it has an established competitor in Telemundo. In short, compared to the three major networks that existed when the finsyn rules were adopted, the viewer who receives over-the-air broadcasting as his sole television service now has the opportunity to get seven English language commercial networks, public broadcasting, two Spanish language networks plus a significant number of independent television stations.[61]

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[59] Second Report and Order, 8 FCC Rcd at 8286 (1993). *See Schurz Communications*, 982 F.2d at 1053 ("By limiting Fox in this way the new financial interest and syndication rules limit competition with the major networks and thus entrench the market power that is the rules' principal rationale.").

[60] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358, 4407 (1997); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 13 FCC Rcd 24284, 24344-45 (1998).

[61] *See* Ninth Video Competition Report, 17 FCC Rcd at 26940-41.

Plain and simple, television viewers have far more diverse choices than ever before.[62] But the proponents of new finsyn programming quotas are unconcerned with viewers' choices, and instead focus solely on themselves and their preferences among purchasers of programming. And even at that, their view of the market is misleadingly focused on just the four largest broadcast networks and the types of programs that these entities present on their prime time schedules. Looking at the broader video marketplace, however, the Commission has found that concentration in the national market for the purchase of video programming continues to decline.[63]

As early as 1991, Judge Richard Posner pointed out that "[t]oday each of the three networks buys only 7 percent of the total video and film programming sold each year, which is roughly a third of the percentage in 1970." *Schurz Communications*, 982 F.2d at 1046. Consistent with this finding, economic data submitted by CBS, NBC and FOX with their initial Comments in this proceeding demonstrates the vast number of program purchasers that currently compete with the Top 4 broadcast networks.[64] The analysis shows that markets in which video distributors buy programs generally are not concentrated on the buying side because program producers can use the same creative and physical inputs to produce entertainment product for films, non-series and non-prime-time shows, cable networks, first run syndication, home video distributors, and so on. Owen Study at 2-3. Alternative delivery systems "and their ability to rapidly take dissatisfied viewers away from broadcast television" provide a significant

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62 *See* Second Report and Order, 8 FCC Rcd at 3304 (noting the emergence of new viewing options since the finsyn rules were first adopted, including many new networks, new television stations, and new cable television networks).

63 Ninth Video Competition Report at Table B-4. *See* Owen Study.

64 *Id.*

competitive restraint. *Id*. at 2. The demand for video programming is very far from being dangerously concentrated. Given the inefficiencies created by regulatory constraints, it is clear that a revival of finsyn would be an undertaking with costs but no benefits.

Finsyn Proponents Distort the Concept of Diversity

The concept of diversity advanced by the advocates of new finsyn rules has virtually no connection to the Commission's historic definition of program diversity. In a television universe that includes hundreds of channels and programming that includes documentaries, news, courtroom coverage, the arts, and many other diverse categories, the commenters' focus just on "dramas, sitcoms, news programs, sports, action dramas, [and] movies of the week" on just four of the seven broadcast networks does not consider diversity from the viewer's perspective. Put another way, they do not consider diversity in its broader sense as a component of the public interest but focus on their own interest in selling programs to particular distributors. They define the relevant market as the four major broadcast networks, even though the number of networks considered "major" has expanded while the total number of broadcast networks has more than doubled since finsyn rules were first adopted. When Spanish language networks are counted, the number of networks has tripled.

The finsyn proponents' exclusive focus on the "major" broadcast networks reveals that their true aim is to impose regulation on those networks to which the advocates would prefer to sell their programs because they reach the largest (albeit declining) portions of the broadcast audience. But the Commission was always quite clear that regulatory protection for producers' preferred markets was not the type of "diversity" the original finsyn rules were designed to protect. When it first adopted finsyn rules in 1970, the FCC emphasized that "it is not our intention or objective to smooth the path for existing syndicators or promote the production of any particular type of program – whether or not it be included within the present category of quality high cost programs."[65] Yet, that is what the neo-finsyn proponents ask the FCC to do: smooth the way for airing of their own shows.

When it repealed the bulk of the finsyn rules, the FCC expressly rejected producers' claims that "specialized programming, news, or low-budget topical or game shows" did not contribute to diversity based on claims that such shows do not "fare well in subsequent domestic or foreign syndication." The Commission concluded that:

> [o]ur appropriate regulatory focus . . . is not on whether producers would generally prefer to strike deals with one of the established networks, but rather whether the overall demand for programming in the broadcast and cable marketplace limits a network's ability to control the market or dictate prices for prime time entertainment programs.[66]

As the United States Court of Appeals for the Seventh Circuit noted when it rejected the Commission's retention of finsyn rules ten years ago, it is "understandable why the existing producers support the financial interest and syndication rules: the rules protect these producers against new competition both from the networks (because of the 40 percent cap) and from new producers." *Schurz Communications*, 982 F.2d at 1051.

Because the concept of "diversity" that is promoted by the finsyn rules has never been well defined, advocates of the rules have a difficult time naming the values they are seeking to promote. *See Schurz Communications*, 982 F.2d at 1054 ("while the word diversity appears

[65] *Mt. Mansfield Television, Inc.*, 442 F.2d at 480 n.32, quoting *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition And Responsibility in Network Television Broadcasting*, 23 F.C.C. 2d 382, 397 (1970).

[66] *Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd at 8285-86. Then, as now, the finsyn proponents "improperly discount[ ] the significance of the network' declining audience share" and they say "virtually nothing about the emergence of Fox as a viable 'fourth' network." *Id*. at 8286, 8288.

with incantatory frequency in the Commission's opinion, it is never defined"). The principal value they seek to promote is that they – and not the "major" networks they seek to regulate – will produce more programs, but this argument is far from compelling. *See*, *e.g.*, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476 (1940) (economic injury alone is not a separate and independent public interest factor). Accordingly, finsyn proponents argue that a non-network production quota will result in "better" or more "creative" programming.

But the argument that we will get "better" entertainment shows through regulation is difficult to understand and impossible to prove based on experience. Although the finsyn proponents couch their demands for new finsyn rules in terms of a desire to return to the "Golden Age of TV," this reference is rather baffling, since the "Golden Age" was a period of utter network domination of television.[67] More specifically, the Writer's Guild urges the Commission to avoid the "vast wasteland" predicted in the 1960s, and advocates the creation of a regulatory environment that it claims would nurture the "entrepreneurial businessmen and women" who created "classic weekly television programs" such as "Mary Tyler Moore," "All in the Family," and "The Cosby Show." But there is a slight problem with the Guild's analysis: two of the three shows on its list were developed before the finsyn rules ever existed.[68]

Contrary to their claims about diversity, the finsyn proponents would do more to perpetuate former FCC Chairman Newton Minow's vision of a "vast wasteland" by trying to focus network exhibition on certain programming types (*e.g.*, dramas and sitcoms) to the

[67] Compare CPD Reply Comments at i, with Erik Barnouw, TUBE OF PLENTY (1977) (early 1950s was considered to be the Golden Age of television).

[68] 1991 Order, 6 FCC Rcd at 3229 (Commissioner Quello, dissenting) (noting that programs like "All in the Family, M*A*S*H, "The Mary Tyler Moore Show," "The Bob Newhart Show, and "The Carol Burnett Show" were developed before the finsyn rules went into effect).

exclusion of other new programming forms.[69] Indeed, by the time the FCC was considering eliminating finsyn rules in the early 1990s, Chairman Minow noted that, with respect to programming choices, the media landscape had been transformed. Noting the advent of new programming services and VCRs, Minow said that "you can watch a program when you want to see it, not just when the broadcaster puts it on the schedule. If you are a sports fan, a news junkie, a stock-market follower, a rock-music devotee, a person who speaks Spanish, a nostalgic old-movie buff, a congressional-hearing observer, a weather watcher – you now have your own choice." Indeed, he noted that "[t]he FCC objective in the early 1960s to expand choice has been fulfilled – beyond all expectations."[70]

The proponents of new finsyn rules would limit diversity by requiring a certain portion of the major network prime time schedule be set aside for certain types of program forms (*e.g.*, those that will do well in syndication, and, as a result, for their own pocketbooks). This, of course, is the opposite of diversity. For the 1994-95 television season, for example, 46 percent of the prime time programs on the four networks were situation comedies. This season, by contrast, about one third of the shows on the network schedules are situation comedies, due, in part, to the growth in reality programming.[71] While different people have varying reactions to reality shows, it cannot be argued with straight face that there is a compelling public interest in

[69] In 1961, Minow called television a "vast wasteland" of "game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, western badmen, western good men, private eyes, gangsters, more violence, and cartoons" – the very types of programs the finsyn proponents now seek to perpetuate. *See* Newton N. Minow, Television and the Public Interest, Speech delivered at the National Association of Broadcasters Convention, Washington, D.C., May 9, 1961.

[70] Newton Minow, How Vast the Wasteland Now?, address at the Freedom Forum Media Studies Center, Columbia University, May 9, 1991.

[71] Poltrack Statement at 3. Reality programming increased from 5 percent of network schedules in 1995 to about 15 percent this season.

adopting federal regulations to preserve prime time space for sitcoms, or that reality shows have garnered lower ratings. Quite to the contrary, more reality programs have been produced because the genre has proven to be quite popular among viewers.

Similarly, the argument that imposing non-network production quotas will produce more "creative" programming is both fanciful and difficult to justify under the FCC's public interest mandate. Stephen J. Cannell, a member of the Coalition for Program Diversity, has provided examples that he claims support the adoption of new finsyn rules. He has written that CBS wanted to cast a more handsome actor in the title role of his series "The Commish," and that the networks "didn't get it" when David Chase pitched the idea for a series that became "The Sopranos." The result, Cannell wrote, is that he took his idea for "The Commish" to ABC, and David Chase took "The Sopranos" to HBO, where it "went on to redefine the face of television."[72]

Far from demonstrating the need for federal regulation, both anecdotes show that producers can take their ideas across the street to other networks in order to preserve their creative vision. In the case of "The Sopranos," it is unlikely that the show would have "redefined the face of television" had it been picked up by a broadcast network and been subject to more restrictive content standards. Quite to the contrary, "The Sopranos" became the phenomenon it was because of the emergence of programming outlets like HBO that did not exist when the finsyn rules were adopted.

Even if some plausible argument could be made that federal regulators could in some way assist the creative process for entertainment programming, it is difficult to understand how such a purpose corresponds to the FCC's public interest mandate. As Commissioner James

Quello wrote when he dissented from the Commission's short-lived decision to retain a portion of the finsyn rules in 1991:

> I asked one executive from an independent production company, who had been urging me to preserve creativity and quality in television, exactly how network involvement would have changed his most successful show – "The A Team." He was stuck for an answer. Yet even if he had been able to describe the particular ways in which barring a financial interest would have improved "The A Team," I am not at all certain I would want my public interest calculus in this proceeding to turn on that answer.

1991 Order, 6 FCC Rcd at 3228 (Commissioner Quello, dissenting). Even if proponents of new rules could make a logical argument that there is a relationship between programming quotas and quality shows – a link that defies logic – the FCC should not set itself up as the arbiter of taste. That role properly belongs to the American viewing public, who seems more than satisfied with its plethora of choices.

Finsyn Proponents Distort the Evidence

The problem with the pro-finsyn comments is not just conceptual; it is numerical as well. The Coalition for Program Diversity presents statistics on program ownership that it touts as "irrefutable" that are in fact simply incomprehensible. The CPD purports to present hard data through a series of bar charts, pie charts, lists of declining numbers of independent producers over time, and program lists on the major networks for seasons from 1992 to 2003. But the numbers the neo-finsyn proponents use are cooked up to create the false argument that the networks dominate the programming market as never before. But they can reach that conclusion only through creative definitions of the concepts of "independent" and "network-affiliated" productions, and by simply failing to disclose the many different producers and

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[72] Stephen J. Cannell, *How Networks Can (and Do) Stifle Producers*, BROADCASTING & CABLE, February 24, 2003 at 16.

creative entities who contribute to the diversity of network television. In short, the "statistics" from which the CPD's various bar charts and pie charts are derived are essentially meaningless for a variety of reasons:

- Finsyn proponents include news and sports programs in their statistics for "network productions" even though such shows were never covered by the finsyn rules.

- The comments classify programs produced by a studio affiliated with a "major" (*i.e.* Top 4) network but aired on a different network as "network affiliated."[73]

- Finsyn advocates classify shows as "network affiliated" when a producer receives financial backing from a Top 4 network or its affiliated studio, but as "independent" when a producer teams up with a major studio not affiliated with a Top 4 network – even if that studio owns an "emerging" network (*e.g.* Warner Brothers and the WB Network).[74]

- The CPD data fails to list a single non-network production company that produces shows for emerging broadcast networks in the current list of "independent" producers.

- Judging concentration by the level of major studio involvement in broadcast network programming – a measure adopted by both the FCC and the court of appeals – the level of concentration has declined since finsyn rules were repealed.[75]

[73] With these first two factors alone, the percentage of "network productions" for the 2002-2003 television season (assuming the Coalition's data is correct) drops from 76 percent to 60 percent. *See* Joint Commenters' Reply at 56.

[74] When such co-productions are excluded from the total (along with news and sports), only 35 percent of the prime time programs during the 2002-2003 season should be considered "network affiliated." *Id.*

[75] Based on the CPD's own data, 51 percent of programs on the four top networks were affiliated with a major studio during the 2002-2003 season. In 1992-1993, the corresponding number was 56 percent. In *Capital Cities/ABC, Inc.*, 29 F.3d at 312, the court found that, as a result of the finsyn rules, "the market for the production of prime-time television programs had become concentrated in a handful of Hollywood studios."

- Curiously, the January 2003 press announcement of the finsyn proponents relating to their FCC filing lists as independent producers joining in the filing several not even mentioned in the CPD charts.[76]

The only consistent factor in the CPD data is the commenters' desire to make it appear that the independent production community has shrunk, but the picture they present is totally false. The data submitted to the Commission omits key facts and misrepresents the significance of the information that is offered. The list of "Independent Television Producers" from 1985 to 2002 is a prime example of this distortion. It suggests that the number of independent producers declined from 25 in 1985, 23 in 1990, and 22 in 1992, to a mere 5 in 2002.[77] But turning to reality – a genre disliked by the finsyn proponents -- the actual level of involvement by independent producers in prime time shows on the seven English-language networks presents an utterly different picture. Many independent companies are involved in producing prime time network television programs for the 2002-2003 season, some on their own, and others in co-production arrangements with studios and/or networks.[78]

Coalition for Program Diversity List of Independent Producers for 2002-2003	Actual Involvement by Independent Production Companies in Prime Time 2002-2003
Carsey-Werner-Mandabach	Carsey-Werner-Mandabach
Hallmark	Hallmark
Stephen Bochco Productions	Stephen Bochco Productions
Universal	Universal Network Television
Warner Bros.	Warner Bros.
	Sony Pictures Television
	FremantleMedia, Inc.
	Survivor Productions, LLC
	Worldwide Pants, Inc.

[76] *See Writers Guild, Producers Guild and Independent Producers Call on FCC to Protect Competition and Diversity in the Broadcast and Cable Entertainment Marketplace*, *at* http:// www.wga.org/pr/0103/protect.html (Jan. 2, 2003).

[77] *See* CPD Reply Comments, Exhibits, p. 2.

[78] *See* Exhibit 1, attached ("Independent" Producers for Programs on the Top Four Broadcast Networks 2002-2003).

Coalition for Program Diversity List of Independent Producers for 2002-2003	**Actual Involvement by Independent Production Companies in Prime Time 2002-2003**
	HBO Independent Productions
	David Hollander Productions and Gran Via Productions
	Endemol Entertainment
	David E. Kelley Productions
	Stone Stanley Entertainment
	Nineteen Production
	Granada Television
	Wolf Films
	Bruce Nash Entertainment
	Telepictures
	DreamWorks Television
	Rocket Science Laboratories
	Johnny Lindy Company
	Wild Jams Productions
	Imagine Television
	2929 Entertainment
	Alliance Atlantis Productions
	Jerry Bruckheimer Television

The list of independent producers is even longer when it includes the companies and individuals that are given production credits for their creative involvement with prime time network programming.[79] Additionally, there is a significant and expanding amount of independent production for cable television networks and other broadcast networks.[80]

The CPD list is deceptive in other ways, as well. For example, it includes Aaron Spelling Productions as its first entry in each of the years 1985, 1990 and 1992, but it does not include this company on the list for 2002. Does this mean that Aaron Spelling has ceased to exist, or that he will no longer contribute programs like "The Love Boat," "Dynasty," or "Melrose Place" to the network programming mix? Not at all. Spelling was left off the list

[79] *See* Exhibit 2, attached (Examples of Production Credits for Programs on the Top Four Broadcast Networks 2002-2003).

[80] *See* Exhibit 3, attached (Examples of "Independent" Production Credits for Programs on PAX, WB and UPN Broadcast Networks 2002-2003).

because his production company became part of Viacom in 1999. But this does not mean, as the pro-finsyn commenters claim, that Spelling no longer adds to network diversity. Quite to the contrary, his production company provides programming for various networks.[81]

Many other prolific production companies are ignored in the CPD data as well. For example, Gavin Polone's Pariah productions (which produces "Gilmore Girls" and "Family Affair" on The WB as well as feature films and various cable series) has 33 programs in development, 27 of which are with networks.[82] Industry Entertainment has 14 projects in development and has sold scripts to ABC, CBS, NBC, FX, VH1 and Showtime.[83] Kaufman Company is developing a number of television movies for the networks.[84] Other information in the CPD data is similarly inexplicable. For example, series produced by David E. Kelly (*e.g.*, "Boston Public," "Girl's Club," "The Practice") are listed in the CPD data as 20th Century Fox Television productions. However, while those programs are co-produced with Fox, Kelley owns the copyright to the shows.[85]

Get Real

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[81] Currently, Aaron Spelling Productions produces "7th Heaven" and "Charmed" on The WB network. In addition, Spelling has three pilots for shows on ABC, The WB and UPN for 2003-2004.

[82] *See* Jesse Katz, *How a Pathologically Blunt Producer Makes It in Suck-Up City*, LOS ANGELES MAGAZINE, Feb. 9, 2003 at 49.

[83] *See* Michael Schneider, *Industry's Arm Flexes TV Muscle*, VARIETY.COM, November, 17, 2002.

[84] *See* Melissa Grego, *Kaufman Etches TV Slate*, VARIETY.COM, November 11, 2002.

[85] See *Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd 3094, 3234-35 (1991) (Commissioner Quello, dissenting) (noting that copyright ownership is a better indicator of concentration than is co-production).

Much of the finsyn proponents' pitch for network production quotas is a diatribe against reality programming, which they claim is undermining both diversity and quality in television programming. The Coalition, for example, blames the trend toward reality programming as contributing to the "blandness and sameness" in network programming that "attracts smaller audience shares."[86]

While there no doubt are many arguments that may be made about trends in reality television, "blandness" and "sameness" are not among them. As TIME magazine reported recently, "reality TV is, in fact, the best thing to happen to television in recent years. It has given the networks water-cooler buzz again; it has reminded viewers jaded by sitcoms and dramas why TV can be exciting; and, at its best, it is teaching TV a new way to tell involving human stories."[87] Plus, it is more than a little odd to blame a new programming genre for contributing to "sameness" on television, when almost half the shows on the networks were situation comedies in the final season before finsyn was repealed.[88] Accordingly, the FCC's internal study in this ownership proceeding concluded correctly that programming diversity has increased since

[86] The CPD asserts that prime time network controlled television programming is bland, and this blandness exists in large measure because the vast majority of programs are produced and owned by the networks. CPD Reply Comments at 13. Not only are the Coalition's ownership claims bogus, but its reliance on the FCC's study #5 to support its argument (Mara Einstein, PROGRAM DIVERSITY AND THE PROGRAM SELECTION PROCESS ON BROADCAST NETWORK TELEVISION, Sept. 2002) is simply outrageous. That study found that "[t]he bottom line is this: diversity *increased* after the repeal of fin-syn." PROGRAM DIVERSITY AND THE PROGRAM SELECTION PROCESS at 17 (emphasis in original). With respect to the purported blandness, it found "[o]verall . . . there does not appear to be any consensus about the state of the television landscape." *Id*. at 48.

[87] *Why Reality TV is Good for Us*, TIME, February 17, 2003, p. 65.

[88] Poltrack Statement at 3 (46 percent of the prime time programs on the four networks in the 1994-95 television season were sitcoms). *See also* PROGRAM DIVERSITY AND THE PROGRAM SELECTION PROCESS, at 16 (In 1997 55 percent of all network programming represented two genre categories – situation comedies and crime/detective dramas).

the finsyn rules were repealed.[89] In any event, however one may try to measure "blandness" on television, there is no indication that gains in the reality genre came at the expense of higher quality scripted shows. As TIME put it, "reality shows aren't supplanting creative successes like *24* or *Scrubs*; they're filling in for duds like *Presidio Med* and *MDs*."[90]

Beyond the aesthetic arguments, the Coalition's claim that reality programming attracts smaller audience shares is simply bizarre. "On a sheer ratings level, the latest wave of reality hits has worked a sea change for the networks."[91] Ratings for such programs "are up across the board. Five from the genre are in the season's Top 10."[92] In addition, contrary to the Coalition's claims, major advertisers now see reality programming as an attractive venue for their ads.[93] Not that any of this is an appropriate area for federal regulation. If the networks make bad choices and put on programs that viewers refuse to watch, the market will punish them and they will change their ways.[94]

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[89] PROGRAM DIVERSITY AND THE PROGRAM SELECTION PROCESS, at 16-17.

[90] TIME, February 17, 2003 at 66 ("When sitcoms started cloning goofy suburban dads and quirky, pretty yuppies, we got *The Osbournes*.").

[91] *Id*. at 65.

[92] David Lieberman, *Will Reality Bite the TV Networks?* USA TODAY March4, 2003; Bill Carter, *Reality TV Alters the Way TV Does Business*, NEW YORK TIMES, January 25, 2003.

[93] Stuart Elliott, *Advertisers Decide It's Time for 'Reality,'* NEW YORK TIMES, February 14, 2003 ("with the continuing ratings success of shows like "Joe Millionaire," "The Bachelorette" and others, advertisers like Kraft Foods that initially sniffed at the genre have changed their minds"); Lieberman, *supra* ("[M]ajor advertisers no longer see reality as prime time's trailer park. AT&T, Coca-Cola and Ford Motor bought time on *American Idol* when they saw upscale viewers tuning in.").

[94] In the past, when networks scheduled prime time news magazines or game shows in response to initial ratings successes, the cyclical nature of the business forced them to reassess their decisions. *See* Carter, *supra* ("Several network executives said they would not consider cutting back on budgets for developing scripted shows, citing ABC's calamitous decision to do that when it had "Who Wants to Be a Millionaire" showing as many as four nights a week.").

In this respect, the market is a far better regulator than any federal agency, particularly given the proposed solution of network production quotas. It is particularly ironic that those who urge the Commission to blunt the trend toward reality programming seek to impose network production limits, since most reality shows are produced by independent producers. Just to name a few examples, Mark Burnett and Castaway Television produces *Survivor*; FremantleMedia, Inc. produces *American Idol*; Stone Stanley Entertainment produces *The Mole*; Granada Television produces *I'm a Celebrity, Get Me Out*; and Telepictures produces *Are You Hot?*, *The Bachelor*, and *The Bachelorette*. If the Commission imposed a cap on network production at a specified percentage of the prime time schedule, the most likely effect would be to increase the amount of reality programming.

Ultimately, finsyn proponents' arguments about reality programming are simply an updated plea for the government to intervene on the theory that it knows the television business better than the networks. In the last review of the finsyn rules, the argument was made that networks would "warehouse" their inventory of programs, withholding them from syndication in a bid to choke off competition from independent stations. But this suggests that the networks would engage in behavior that is contrary to their own economic interests, and the FCC rejected the argument, finding no evidence to support it.[95] The current claim is based on the argument that broadcast networks will air programs because they are cheap to produce, even at the expense of driving viewers to the competition and alienating their best advertisers. This is

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See also Gary Levin, *Networks Mindful of a Reality Bite*, USA TODAY February 10, 2003; Josef Adalian, *Nets Turn Their Back on Reality*, VARIETY.COM, March 30, 2003 ("next fall, look for more scripted series and less nonfiction fare").

[95] 1995 Order, 10 FCC Rcd at 12171.

sheer nonsense. But even if the argument had any merit, the new finsyn proponents cannot justify the adoption of rules to save the networks from themselves.

What is plausible – and equally anathema from a policy perspective – is that the finsyn advocates are simply seeking to reinstate a secured market for themselves through government regulation. However, the Commission's hard experience with such protectionist policies should persuade it to avoid making the same mistake again.

Memorandum

III. Proposals for New Finsyn Rules Are Legally Insupportable

The number of broadcast networks has tripled since the original finsyn rules were first adopted, hundreds of cable networks have sprung into existence, viewers have myriad programming options that were undreamed of when the rules seemed necessary, and producers have many more markets to exploit than ever before. Yet advocates of network program production quotas base their case for new finsyn rules on a single claim – a lack of "diversity." However, if the factual case for new finsyn rules seemed farfetched, it is only because the proponents of new rules had not yet presented their legal argument, which boils down to this: They assert that Judge Richard Posner, who authored one of the most stinging rebukes to agency decision-making in FCC history in *Schurz Communications, Inc. v. FCC*, actually wrote a decision that *favored* the imposition of financial interest and syndication rules.

The audacity of this claim boggles the mind. Describing Judge Posner as "one of the nation's foremost antitrust scholars" (the only part of the argument that rings true), the Coalition for Program Diversity claims that the *Schurz* decision gave a "judicial green light [to] allowing the Commission, based on the record, to adopt an independent producer carve out in the networks' prime time schedule." CPD Reply Comments at ii, 16. They allude to the Seventh Circuit's "clairvoyance" and conclude that Judge Posner's opinion for the court "acknowledged that the FCC's goal of promoting programming diversity may require FCC action, including the adoption of a content-neutral independent producer carve out from the network's prime time schedule." *Id*. at 16.

One need only read the opinions in *Schurz Communications* and *Capital Cities/ABC, Inc. v. FCC* to appreciate the absurdity of these claims. But it is worth noting that the finsyn advocates themselves never believed the decisions were an endorsement of their position. They thought Judge Posner was not just wrong, but was biased against them, and they sought his removal from the case. Two weeks after the decision in *Schurz Communications* was released, some of the parties – including advocates who submitted the current CPD comments – sought Judge Posner's removal on the basis of 28 U.S.C. §455(a), which requires disqualification if the judge's "impartiality might reasonably questioned."[96] Judge Posner denied the motion and pointed out that "[l]itigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them." *Schurz Communications*, 982 F.2d at 1060.

The Seventh Circuit Did Not Give a "Judicial Green Light" to Finsyn Rules

No doubt Judge Posner would be surprised to learn that he was on the same side as the rules' proponents all along, as today's finsyn proponents claim. But of course he was not. Advocates of regulation have merely plucked a few phrases from the *Schurz* opinion regarding the FCC's general grant of authority and quoted them out of context to convey the false impression that the court thought that the rules were either necessary or effective. It is not true, as the Coalition asserts, that the Seventh Circuit vacated the finsyn rules merely because the Commission failed adequately to explain its reasoning. Quite to the contrary, the Court also found that:

- The rules (including a 40 percent in-house production cap) "appear to harm rather than to help outside producers *as a whole* (a vital

[96] The basis for the petition was that Judge Posner as a law professor had submitted an affidavit as an expert witness on behalf of CBS in an antitrust case 16 years earlier. He denied the motion, noting that it did not suggest bias that he expressed an expert opinion "in a different case, involving a different tribunal, a different statute, different facts, and different issues in an industry much changed since the 1970s." *Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1062 (7th Cir. 1992) (opinion of Judge Posner in chambers).

qualification) by reducing their bargaining options." *Schurz Communications*, 982 F.2d at 1051 (emphasis in original).

- The rules protect existing producers "against new competition both from the networks (because of the 40 percent cap) and from new producers. The ranks of the outside producers of prime time programming have been thinned under the regime of financial interest and syndication rules. The survivors are the beneficiaries of the thinning." *Id*.

- By limiting the growth of Fox as an emerging network, "the new financial interest and syndication rules limit competition with the major power networks and thus entrench the market power that is the rules' principal rationale." *Id*. at 1053.

- Even if the networks had market power, the finsyn rules "do not seem rationally designed to prevent its exercise. . . . All they can do is increase the costs of production by denying producers the right to share risks with networks." *Id*. at 1052.

- The finsyn rules "appear to handicap the networks and by handicapping them to retard new entry into production; how all this promotes programming diversity is mysterious." *Id*. at 1055.

On remand, after the Commission supplemented the record and decided to repeal the finsyn rules, the Seventh Circuit entered additional findings that only reinforced its initial conclusions. It found, for example, that:

- It is doubtful that the fears that networks would refuse to sell syndicated programming to competitors "ever had much basis." *Capital Cities/ABC, Inc.*, 29 F.3d at 311-312.

- "Contrary to the stated aim of the finsyn rules of increasing programming diversity, the market for the production of prime-time television programs had become concentrated in a handful of Hollywood studios, firms sufficiently large and diversified to bear the risks that the finsyn rules prevented producers from shifting to the networks." *Id*. at 312.

- The continuing finsyn rules that applied only to "major" networks appeared calculated to discourage emerging networks such as Fox. Avoiding such rules, on the other hand, "would enlarge the program market and so provide more competition for the three major networks." *Id*. at 313.

- When the court first confronted the FCC's rewrite of the finsyn rules, which included a 40 percent in-house production limit for network programming, "it threw out the rules, convinced that the objections to them were unanswerable." *Id*.

The Coalition's comments completely avoid any discussion of the Seventh Circuit's holdings, and instead quote selected sentences from the court's background discussion of the FCC's general powers under the Communications Act. Accordingly, the claim that the *Schurz* court "recognized the potential diversity diminishing impact of further network deregulation" is absurd. CPD Reply at 14. The quoted language was not an endorsement of finsyn, as the comments misleadingly suggest. Rather, the quoted language demonstrated the perverse, undesirable impact that the rules might have on the programming marketplace. The sentence that CPD quotes was followed by the following two concluding sentences:

> The Commission's stated desiderata are competition and diversity. The rules adopted by the Commission in order to achieve these desiderata have the remarkable property -- if the risk-sharing argument that the Commission did not deign to address is correct -- of disserving them both.

Schurz, 982 F.2d at 1051-52. Clearly, nothing in the court's decision can be interpreted as favoring the retention or reimposition of finsyn rules.

The Coalition's General References to "Diversity" Cannot Justify the Adoption of New Finsyn Rules

The sole justification cited by finsyn proponents for a network production quota is that in the years since repeal, the major networks have participated more in the programming market than they did during the years when finsyn was in place. But this is hardly unanticipated. The Commission eliminated the rule precisely so that networks could produce more of their own programs and also participate in co-productions with other production companies as an alternative to the studios. That they have done so was to be expected, and is not a threat to programming "diversity" as the finsyn proponents claim. What is lacking in their legal analysis is any discussion of how their generalized references to "diversity" could justify new rules.

Indeed, the FCC referred to the goal of diversity "with incantatory frequency" when it modified the rules and adopted network production limits in 1991, yet it did not save the rules from being vacated. The court of appeals took the Commission to task for failing to explain what it meant by the term, and it pressed the agency to explain how finsyn rules and production quotas could ever serve the asserted goal.[97] The Commission, stuck for an answer, eliminated the rules. In the years since, the United States Court of Appeals for the District of Columbia Circuit has further emphasized that rules justified by reference to the FCC's diversity goal cannot be upheld where "[t]he government's formulation of the interest seems too abstract to be meaningful," as it is here.[98]

The Coalition cannot plug this gap in its reasoning by references to cases involving different rules, such as the must carry rules or the station ownership rules. *See* CPD Reply at 16-18. When the Supreme Court found that protecting viewers from loss of regular television service is "an important federal interest," it was referring specifically to the loss of free over-the-air television service, and not to the possibility that a producer might accept financial backing from a network.[99] Indeed, the Court stressed that its statutory goals are not interchangeable; diversity in one context may be an important goal but not in another.[100] Indeed,

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[97] *Schurz Communications*, 982 F.2d at 1054-55 ("how all this promotes programming diversity is mysterious").

[98] *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998).

[99] *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 190 (1997) ("*Turner II*").

[100] *Id.* at 190-191 (refusing to include in its review any rationale "inconsistent with Congress' stated interests in enacting must carry"); *cf.*, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v.*

the Coalition's citation to the case law on this point appears to be almost random.[101] Certainly nothing in the current submissions can identify a significant interest in diversity that neither the FCC nor the courts could decipher in nearly two decades of review proceedings.

Proposed Network Production Quotas Cannot be Justified as a Content-Neutral Speech Restriction

Although finsyn proponents try to defend the adoption of new rules as being "content neutral," they reveal a purpose that is anything but neutral whenever they try to provide any substance to their discussion of "diversity." At the heart of the Coalition's argument is that finsyn rules are needed because of CPD's concern about the content of network programming. CPD's Reply Comments are replete with references as to how the absence of finsyn rules has resulted in the networks' broadcasting of excessive "reality" programming, CPD Reply at 6; that network programming in prime time has become "bland," *id*. at 13; and that regulation is needed to preserve programming "quality." *Id*. at 8. *See also* Joint Comments of Writers Guild of America, west, *et al.*, at 10. Any rules based on promoting such goals cannot be defended as content-neutral.

To be considered content-neutral, any FCC regulations must have neutral means *and ends*. Thus, otherwise neutral structural regulations are subject to strict First Amendment

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FCC, 835 F.2d 292 (D.C. Cir. 1987) (refusing to sanction must carry absent congressional findings). *See also Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (it is impermissible to "supplant the precise interests put forward by the State").

[101] *See, e.g.,* CPD Comments at 18, citing to *United States v.* O'Brien, 391 U.S. 367 (1968) as a decision which "sanctions the Commission's effort to promote the widespread dissemination of information from a multiplicity of sources." Contrary to this characterization, *O'Brien* is a case about regulating the burning of draft cards, and has nothing to do with the goal of broadcast diversity.

scrutiny if they are designed to promote (or punish) particular content or particular publishers.[102] The commenters' citations to the *Turner Broadcasting v. FCC* decisions are therefore inapposite, since the Supreme Court made clear in those cases that must carry rules would not be upheld if they were justified by reference to broadcast content. Indeed, the one point on which a majority of the Supreme Court agreed in *Turner I* was that any must carry regime justified by the value of the programming itself would be presumptively invalid. *Turner Broad. Sys., Inc. v.* FCC, 512 U.S. 622, 644-46 (1994) ("*Turner I*"); *see also id*. at 678-681 (O'Connor, J., concurring in part and dissenting in part). As Justice Breyer stated in later concurring to make up the slim 5-4 margin by which must carry survived constitutional scrutiny, "government intervention and control through [must carry] regulation can prove appropriate" only "when not content based."[103]

Finsyn proponents rely on the *Schurz* court's broad view of the Commission's general powers to regulate networks, while ignoring its specific findings on the rule in question. But they also overlook more recent case law that confirms limits on the FCC's power to regulate content. In *Motion Picture Association of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002), the United States Court of Appeals for the District of Columbia Circuit made it clear that the Commission's authority to regulate in areas that directly affect speech and programming is far more limited than previously believed and that the FCC cannot rely on general statutory authority to regulate content – as proponents are arguing it should now do with finsyn. The court

[102] *See News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir 1988) (using strict scrutiny analysis to strike down law imposing purely structural communications regulation, where impact directly affected content and viewpoint issues). *See also, Lutheran Church-Missouri Synod,* 141 F.3d at 354-355 (invalidating Commission's EEO regulations under strict scrutiny standard on the basis that they implicate content).

[103] *Turner II*, 520 U.S. at 228 (Breyer, J., concurring in part) (internal quotation and citations omitted). *See also id*. at 225 (Stevens, J. concurring) ("If this [must carry] statute regulated the content of speech … our task would be quite different.").

rejected the Commission's claim that its video descriptions rules should be upheld as "content neutral," noting that the FCC has acknowledged that the rules, which required the creation of program scripts, raised "creativity . . . issues." *Id*. at 803. Where, as here, the proponents of rules ask the Commission to restrict the networks' ability to produce programming and to do so in order to promote "creativity," they cannot also claim that such rules would be content neutral.

Exhibits

1. "Independent" Producers for Programs on the Top Four Broadcast Networks 2002-2003

2. Examples of Production Credits for Programs on the Top Four Broadcast Networks 2002-2003

3. Examples of "Independent" Production Credits for Programs on PAX, WB and UPN Broadcast Networks 2002-2003

Exhibit 1

"Independent" Producers for Programs on the Top Four Broadcast Networks 2002-2003*

1. Stephen Bochco Productions

   NYPD Blue (ABC)

2. David E. Kelley Productions (in association with Twentieth Century Fox Television)

   The Practice (ABC)
   Boston Public (Fox)
   Girls Club (Fox)

3. Carsey-Werner-Mandabach Productions, LLC

   That '70s Show (Fox)
   Grounded for Life (Fox)

4. FremantleMedia, Inc.

   American Idol (Fox)
   The Price is Right (CBS)

5. Stone Stanley Entertainment

   The Mole (Celebrity) (ABC)

6. Dream Works Television/20th Century Fox

   Oliver Beene (Fox)

   DreamWorks Television/NBC Studios

   Boomtown (NBC)

7. Wolf Films (in association with Universal Network Television)

   Law & Order (NBC)
   Law & Order: Criminal Intent (NBC)
   Law & Order: SVU (NBC)

8. Nash Entertainment (with NBC Studios)

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* For purposes of this list "independent producer" includes individuals and production companies not owned by or affiliated with a Top 4 broadcast network or its affiliated studio. It lists co-productions involving "independent" producers and both major studios and broadcast networks as well as entirely unaffiliated productions. Studio-produced programs are included as "independent" productions only because they are designated as such by the Coalition for Program Diversity.

Meet My Folks (NBC)

Nash Entertainment/The G Group
Mr. Personality (Fox)

9. Survivor Productions LLC

Survivor (CBS)

10. Worldwide Pants, Inc. and HBO Independent Productions

Everybody Loves Raymond (CBS)

11. Alliance Atlantis Productions (in association with CBS Productions)

CSI (CBS)

CSI: Miami (CBS)

12. Jerry Bruckheimer Television

Profiles From the Front Line (ABC)

13. Nineteen Production

All American Girl (ABC)

14. Hallmark

Dinotopia (ABC)

15. Granada Television

I'm A Celebrity, Get Me Out (ABC)

16. Rocket Science Laboratories

Joe Millionaire (Fox)
Married by America (Fox)

17. Johnny Lindy Company

Meet the Marks (Fox)

18. Wild Jams Productions

30 Seconds to Fame (Fox)

19. Imagine Televison/20th Century Fox

24 (Twenty Four) (Fox)

20. Warner Bros. Television

Good Morning, Miami (NBC)
The West Wing (NBC)
Third Watch (NBC)
ER (NBC)
Friends (NBC)
George Lopez (ABC)
Drew Carey (ABC)
Whose Line Is It Anyway? (ABC)
Wanda at Large (Fox)
Fastlane (Fox)
Presidio Med (CBS)
Without a Trace (CBS)

21. <u>Sony Pictures Television</u>

My Big Fat Greek Life (CBS)
The Guardian (CBS)

22. <u>Universal Television</u>

Just Shoot Me (NBC)
Dragnet (ABC)
Monk (ABC)
Robbery Homicide Division (CBS)
The District (CBS)
The Agency (CBS)
Mister Sterling (NBC)
American Dreams (NBC)

23. Telepictures

Are You Hot? (ABC)
The Bachelor (ABC)
The Bachelorette (ABC)
The Will (ABC)

24. Endemol

Fear Factor (NBC)
Big Brother (CBS)

25. Renegade 83/NBC Studios

Let's Make a Deal (NBC)

26. 2929 Entertainment and CBS Productions

Star Search (CBS)

Exhibit 2

Examples of Production Credits for Programs on the Top Four Broadcast Networks 2002-2003*

1. <u>Stephen Bochco Productions</u>

   NYPD Blue (ABC)

2. <u>David E. Kelley Productions/Twentieth Century Fox Television)</u>

   The Practice (ABC)
   Boston Public (Fox)
   Girls Club (Fox)

3. <u>Carsey-Werner-Mandabach Productions, LLC</u>

   That '70s Show (Fox)

   <u>Carsey-Werner-Mandabach Productions, LLC/Mike and Bill Productions</u>

   Grounded for Life (Fox)

4. <u>FremantleMedia, Inc.</u>

   American Idol (Fox)
   The Price is Right (CBS)

5. <u>Stone Stanley Entertainment</u>

   The Mole (Celebrity) (ABC)

6. <u>Tailwind Productions/NBC Studios</u>

   Crossing Jordan (NBC)

7. <u>DreamWorks Television/NBC Studios/Nemo Films</u>

   Boomtown (NBC)

   <u>Dream Works Television/20th Century Fox/Steven Levitan Productions/Howard Gewirtz Productions</u>

   Oliver Beene (Fox)

8. <u>Constant c Productions and Amblin Television/Warner Bros. Television</u>

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* This list includes the companies and individuals that are given production credits for their creative involvement with prime time network programming during the 2002-2003 television season on ABC, CBS, FOX, and NBC. It lists co-productions involving outside writers/producers with both major studios and broadcast networks, as well as entirely unaffiliated productions. Studio-produced programs are included as "independent" productions only because they are designated as such by the Coalition for Program Diversity.

ER (NBC)

9. Bright/Kauffman/Crane Production/Warner Bros. Television

   Friends (NBC)

10. Vic Schiro and Scott Levitta

    Hunter (NBC)

11. Wolf Films/Universal Network Television

    Law & Order (NBC)
    Law & Order: Criminal Intent (NBC)
    Law & Order: SVU (NBC)

12. Nash Entertainment/NBC Studios

    Meet My Folks (NBC)

    Nash Entertainment/The G Group

    Mr. Personality (Fox)

13. John Wells Productions/Warner Bros. Television

    The West Wing (NBC)
    Third Watch (NBC)

14. KoMut Entertainment/NBC Studios and Three Sisters Entertainment

    Will & Grace (NBC)

15. Mohawk Productions, Inc./Warner Bros. Television

    Wanda at Large (Fox)

16. Mark Burnett, Castaway Television Productions and Survivor Productions LLC

    Survivor (CBS)

17. Worldwide Pants, Inc./Viacom Productions/NBC Studios

    Ed (NBC)

18. HBO Independent Productions/Worldwide Pants, Inc./Where's Lunch Productions, Inc.

    Everybody Loves Raymond (CBS)

19. First Move/Rude Mood/NBC Studios

    Hidden Hills (NBC)

20. Knee Deep Productions /Spelling Television, Inc./NBC Studios

Kingpin (NBC)

21. Radiant Productions/Shaun Cassidy Productions/Universal Television/CBS Productions

    The Agency (CBS)

22. Dave Hackel Productions/Industry Entertainment/Paramount Network Television

    Becker (CBS)

23. Belisarius Productions/Paramount Network Television

    JAG (CBS)

24. Barbara Hall/Joseph Stern Productions/CBS Productions and Twentieth Century Fox Television

    Judging Amy (CBS)

25. Hanley Productions Inc./CBS Productions/Sony Pictures Television

    The King of Queens (CBS)

26. Jerry Bruckheimer/Warner Bros. Television/CBS Productions

    Without a Trace (CBS)

    Jerry Bruckheimer Television/Alliance Atlantis Productions/ CBS Productions

    CSI (CBS)

    CSI: Miami (CBS)

    Jerry Bruckheimer Television/Worldrace Productions/Amazing Race Productions, Inc/Touchstone Television Productions

    Amazing Race (CBS)

27. MoonWater Productions, Inc./CBS Productions

    Touched By An Angel (CBS)

28. Brad Grey Television/The Playtone Company/Marsh McCall Productions/Sony Pictures Television

    My Big Fat Greek Life (CBS)

29. Nineteen Production

    All American Girl (ABC)

30. Hallmark

    Dinotopia (ABC)

31. Granada Television

I'm A Celebrity, Get Me Out (ABC)

32. Renegade 83 Ent.

Love For Sale (ABC)

33. TMD Productions/ABC

Rosanne Reality (ABC)

34. Rocket Science Laboratories

Joe Millionaire (Fox)
Rocket Science Laboratories/Chaos Theory

Married by America (Fox)

35. Johnny Lindy Company

Meet the Marks (Fox)

36. Wild Jams Productions

30 Seconds to Fame (Fox)

37. Real Time Productions/Imagine Televison/20th Century Fox

24 (Twenty Four) (Fox)

38. Komut/Warner Bros. Television

Good Morning, Miami (NBC)

39. David Hollander Productions/Gran Via Productions/CBS Productions and Sony Pictures Television

The Guardian (CBS)

40. Universal Television

Just Shoot Me (NBC)
Dragnet (ABC)
Monk (ABC)

41. Forward Pass, Inc./Universal Network Television)

Robbery Homicide Division (CBS)

42. <u>DiNovi Pictures/Universal Network Television/CBS Productions</u>

The District (CBS)

43. <u>Lydia Woodward Productions/John Wells Productions/Warner Bros. Television</u>

Presidio Med (CBS)

44. <u>Picador Productions/Knotty Entertainment/Paramount Television</u>

Bram & Alice (CBS)

45. <u>Endemol Entertainment/Shapiro/Grodner Productions, Inc.</u>

Big Brother (CBS)

<u>Endemol Entertainment/Pulse: Creative</u>

Fear Factor (NBC)

46. <u>Tea Gal Productions/Java Boy Productions/CBS Productions/20th Century Fox Television</u>

Still Standing (CBS)

47. <u>Pariah Productions/Big Ticket Television/CBS Productions</u>

Hack (CBS)

48. <u>Shadowland Productions/Revolution Television/Red Om Films/Spelling Television/Eye Productions</u>

Queens Supreme (CBS)

49. <u>Andrew Golder Productions/2929 Entertainment/CBS Productions</u>

Star Search (CBS)

50. <u>Telepictures</u>

Are You Hot? (ABC)
The Bachelor (ABC)
The Bachelorette (ABC)
The Will (ABC)

51. <u>Warner Bros.</u>

George Lopez (ABC)
Drew Carey (ABC)
Whose Line Is It Anyway? (ABC)

52. Garfield Grove/Paramount Pictures Television/20th Century Fox Television

Andy Richter Controls The Universe (Fox)

53. Wilmore Films/Regency Television/20th Century Fox Television

Bernie Mac Show (Fox)

54. Mutant Enemy, Inc./20th Century Fox Television

Firefly (Fox)

55. Wunderland Sound & Vision/Warner Bros Television

Fastlane (Fox)

56. The Curiosity Company/20th Century Fox Television

Futurama (Fox)

57. Satin City /Regency Television/Fox Studios

Malcolm in the Middle (Fox)

58. Persons Unknown Productions/20th Century Fox Television/NBC Studios

AUSA (NBC)

59. Camp/Thompson /Regency Television/Fox Television Studios

John Doe (Fox)

60. Once Upon A Frog/Dick Clark /Universal Network Television/NBC Studios

American Dreams (NBC)

61. Renegade 83/NBC Studios/Monty Hall Enterprises

Let's Make a Deal (NBC)

62. Krasnow Productions /NBC Studios

America's Most Talented Kid (NBC)

63. Grub Street/Paramount

Frasier (NBC)

64. Stu Segall/20th Century Fox Television/NBC Studios

Hunter (NBC)

65. Grammnett Productions/Paramount/NBC Studios

In-Laws (NBC)

66. Lawrence O'Donnell, Jr. Productions/Universal Network Television/NBC Studios

Mister Sterling (NBC)

67. Doozer/Touchstone

Scrubs (NBC)

68. Harmond's Reef/NBC Studios

Watching Ellie (NBC)

69. Deedle-Dee Productions/Judgmental Films/3 Arts Entertainment/20th Century Fox Television

King of the Hill (Fox)

Exhibit 3

Examples of "Independent" Production Credits on PAX, WB and UPN Broadcast Networks 2002-2003[*]

1. Mutant Enemy, Inc. and Kuzui/Sandollar (in association with Twentieth Century Fox Television)

   Angel (WB)
   Buffy (WB)

2. Pariah (in association with Turner Television)

   Family Affair (WB)

3. Tujunga Productions, LLC

   Grounded for Life (WB)

4. Tollin/Robbins Productions and Warner Bros. Television

   Black Sash (WB)
   Smallville (WB)

   Tollin/Robbins Productions (in association with Warner Bros. Television)

   What I Like (WB)

5. Everwood Utah, Inc. (in association with Warner Bros. Television)

   Everwood (WB)

6. Dorothy Parker Drank Here Productions and Hofflund/Polone (in association with Warner Bros. Television)

   Gilmore Girls (WB)

7. Bahr Small Productions (in association with Warner Bros. Television Production and Big Ticket Television)

   Jamie Kennedy (WB)

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[*] For purposes of this list "independent producer" includes individuals and production companies not owned by or affiliated with a Top 4 broadcast network or its affiliated studio. It lists co-productions involving "independent" producers and both major studios and broadcast networks as well as entirely unaffiliated productions. Studio-produced programs are included as "independent" productions only because they are designated as such by the Coalition for Program Diversity. Listings for programs and their affiliations on The WB and PAX networks were compiled from production credits reported on publicly available websites and have not been independently verified.

8. Karz Entertainment (in association with Warner Bros. Television Production and Big Ticket Television)

   Jamie Kennedy (WB)

9. Hartbreak Films (in association with Viacom Productions, Inc.)

   Sabrina (WB)

10. FremantleMedia, Inc.

    Family Feud (PAX)

11. Minds Eye Pictures

    Just Cause (PAX)

12. Peace Arch Entertainment

    Miracle Pets (PAX)

13. Stone Stanley Entertainment

    Shop 'Til You Drop (PAX)
    Popstars (WB)

14. Weakest Link Productions (in association with The Gurin Company, BBC Worldwide and NBC Studios)

    Weakest Link (PAX)

15. New Line Television (in association with Trilogy Entertainment Group)

    The Twilight Zone (UPN)

16. World Wrestling Entertainment, Inc.

    WWE Smackdown! (UPN)

17. Greenblatt Janollari Studios and Daddy's Girl Productions (in association with Paramount Network Television)

    One on One (UPN)

18. Grammnet Production (in association with Paramount Network Television)

    Girlfriends (UPN)

19. Warner Bros. Television

    Gilmore Girls: Beginnings (WB)
    On the Spot (WB)

20. Sony Pictures Television

    Dawson's Creek (WB)

21. Sister Lee Productions (in association with Eye Productions)

Half & Half (UPN)

22. Serendipity Productions Inc. and Big Ticket Television

Parkers (UPN)

23. Katlin/Bernstein Productions and CBS Productions

Abby (UPN)

24. Mok Entertainment and Ty Ty Baby Productions

America's Next Top Model (UPN)

25. Industry Entertainment/CBS Productions/Viacom

Haunted (UPN)

26. American Zoetrope/The Greenblatt Janollari Studio/International Famous Players Radio Pictures Corporation/Eye Productions

Platinum (UPN)